

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-7523

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT -----X

RUTH RADOW and SEYMOUR RADOW,

Plaintiffs, Appellants,

-against-

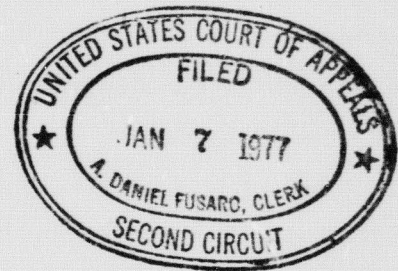
MESSEERS. GREINITO, PETERSON, TRAPANI,
WALKER, ROSE, YACHNIN and WEXNER,
Constituting the Board of Zoning
Appeals of the Town of Hempstead,
State of New York, and THE FOURTH
OCEAN PUTNAM CORPORATION, and THE
TOWN OF HEMPSTEAD,

Defendants, Appellees.

APPEAL FROM
UNITED STATES
DISTRICT COURT
FOR THE EASTERN
DISTRICT OF NEW
YORK - DOCKET
NO. 76-7523

B

-----X
BRIEF FOR APPELLANTS



RUTH RADOW and SEYMOUR RADOW,
Pro, Se
50 Tioga Avenue
Atlantic Beach N.Y. 11509

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT - - - - -X

RUTH RADOW and SEYMOUR RADOW,
Plaintiffs, Appellants,

-against-

MESSEERS. GREINITO, PETERSON, TRAPANI,
WALKER, ROSE, YACHNIN and WEXNER,
Constituting the Board of Zoning
Appeals of the Town of Hempstead
State of New York, and THE FOURTH
OCEAN PUTNAM CORPORATION, and THE
TOWN OF HEMPSTEAD,

Defendants, Appellees.

APPEAL FROM
UNITED STATES
DISTRICT COURT
FOR THE EASTERN
DISTRICT OF NEW
YORK - DOCKET
NO. 76-7523

- - - - -X
BRIEF FOR APPELLANTS

RUTH RADOW and SEYMOUR RADOW,
Pro, Se
50 Tioga Avenue
Atlantic Beach N.Y. 11509

TABLE OF CONTENTS

	<u>Page</u>
Table of Cases, Statutes and Authorities	i-iii
Preliminary Statement	1
Statement of Issues	2
Statement of the Case.....	3,4
Statement of facts	5,6,7

QUESTIONS:

I. Is there a controversey between the Appellants and the Appellees?	
II. Are the legal bases for motion to dismiss for lack of jurisdiction valid?	
III. Has the Eastern District Court the authority to direct HUD to engage in remedial efforts	8

ARGUMENT:

I. Is there a controversy between the Appellants and the Appellees?.....	8-11
II. Are the Legal bases for motion to dismiss for lack of jurisdiction valid?.....	11-12
Is jurisdiction under 28 U.S.C. 1331 required in this case?	13
The members of the Board of Zoning Appeals have not shown that their decisions granting variances and a special exception were necessary because of a compelling State interest.	13,14
The decisions of the members of the Board of Zoning Appeals in this case do not bear "a rational relationship to legitimate State interests."	14
Our fundamental "personal" rights to life and enjoyment of our home are protected by the 14th Amendment against deprivation of State action of officials under color of State law.....	15,16

TABLE OF CONTENTS cont.

The members of the Board of Zoning appeals have failed to comply with State and Congressional objectives set forth in New York Zoning Enabling Statutes and the F.I.A. as amended (42 U.S.C. 4001 et seq)	17,18,19
III. Has the Eastern District Court the Authority to direct HUD to engage in remedial efforts?	20,21,22, 23,24
Res Judicata	24
Conclusion	25

TABLE OF CASES, STATUTES, AUTHORITIES, AND MISCELLANEOUS

	<u>Brief Pages</u>	<u>Appendix</u>
Article 78, Proceeding, Special Term Part I, Nassau County, Justice Suoizzi, Nov. 20, 1975 . . . 5.	22,24	No. 15 P. 12,13
<u>Belle Terre v. Boraas</u> 416 U.S. 1 (1974).....	23	
Case number 16452, Resolution number 2092-1971	4	Ex. 10-C P. 18,19
<u>Construction Industry Associates of Somona County v. The City of Petaluma</u> 375 F. Supp 574.	12	
<u>Construction Industry Associates of Somona County v. The City of Petaluma</u> 522 F 2d 897, 906 (1975)	15,23	
<u>Euclid v. Ambler</u> 272 U.S. 365 (1926)	23	
<u>Hills, Secretary of Housing and Urban Development v. Gauteaux</u> 74-1047 Slip Opinion (April 20, 1976) Supreme Court of the United States	3, 23, 24	Ex. 10-K P. 27,28
<u>Lynch v. Household Finance Corporation</u> 405 U.S. 538 (1972)	4,11,12 13,15	
<u>Marbury v. Madison</u> 1 Cranch 137, 163	23	
<u>S. v. D.</u> 410 U.S. 614, 617 (1973).....	16	
<u>Shapiro v. Thompson</u> 394 U.S. 618 at 634.....	14	
<u>Shelley v. Kraemer</u> 334 U.S. 1, 10 (1948).....	15,16	
<u>Stone v. City of Maitland</u> 446 F 2d 83, 86 1971 Florida Circuit Court, 5th District, Florida	24,25	
<u>Ybarra v. City of The Town of Los Altos Hills</u> 503 F 2d 250, 253 (9th Cir. 1974)	12,13	

TABLE OF CASES, STATUTES, AUTHORITIES, AND MISCELLANEOUS, cont.

	<u>Brief Pages</u>	<u>Appendix</u>
Article 6, Sec. 2 U.S. Constitution	2	
14th Amendment U.S. Constitution	4,7,10, 11,12,15	
42 U.S.C. 1983.....	10,11, 12,13	No. 1 P. 4,5
28 U.S.C. 1343.....	11,12, 13	No. 1 P. 4
28 U.S.C. 1331	13	P. 4
Housing and Urban Development Corporation (HUD)	2,3, 17,24	
Chapter X Federal Insurance Administration, Subchapter B, National Flood Insurance Program, Sec. 1909.24 (a) Suspensions of Community eligibility.....	16,20	
Sec. 1909.1 definitions Subpart A, General 4...	20	
The National Flood Insurance Act of 1968 as Amended (F.I.A.) Public Law 90-448 Approved August 1, 1968	2,6,14, 22,23, 24	
42 U.S.C. 4001 (C) (1) (e) (1) (2) (5)	22	
42 U.S.C. 4012 (1) (2)	20,21	
42 U.S.C. 4022 Sec. 1315.....	20,21	
42 U.S.C. 4101 Sec. 204.....	17	
42 U.S.C. 4121 Sec. 1370 (a) (1)	18	
New York Statute of Local Governments Laws 1964 Chapter 205 Article 1, Sec. 3, Article 2, Sec. 10	10-12	
Laws of 1956 Chapter 295 effective April 4, 1956	14	
New York Town Law, Section 261.....	9,14,20	
Section 262.....	20	
Section 263.....	4,9,14,20	
Section 267.....	12,18	

TABLE OF CASES, STATUTES, AUTHORITIES, AND MISCELLANEOUS, cont.

	<u>Brief Pages</u>	<u>Appendix</u>
Section 3, Standard State Enabling Act, Revised 1926	14	
4/28/75 Complaint for Declaratory and Injunctive Relief Jurisdiction Pl....	1	No.(1) P.4,5
5/24/76 Affirmation of motion to dismiss	1	No.(15)
Affidavit of William Williams	18	P.6,7,8 9,10,11
6/2/76 Answer . . .P3.	3,17	Ex. 1 P.20
Motion for summary Judgment	1	No. (15) P. 14,15
Order granting motion for Summary Judgment, Sept. 30, 1976	1	No. (20) P. 16,17
Minutes U.S. Court House, Eastern District Sept. 28, 1976 P.11...23... ..	7,25	No. (21) 21,22,23
Report - Tidal Flood Plain Information Shoth Shore of Nassau County, Long Island, New York, Prepared by Dept. of the Army New York District, Corps of Engineers for County of Nassau Planning Commission, June 1971 P. 8,60 P.66 Plate 11,48	6,9,10, 18,19	Ex. 4 P. 25,26

PRELIMINARY STATEMENT

A complaint for declaratory and injunctive relief was submitted by appellants Ruth Radow and Saymour Radow 50 Tioga Avenue, Atlantic Beach, Town of Hempstead, Nassau County, New York 11509 to the United States Court House, United States District Court, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York before The Honorable Judge Jack B. Weinstein, Civil Action file No. 75C 638, dated April 28, 1975.

The Hempstead Board of Zoning Appeals, of the Town of Hempstead, County of Nassau, State of New York and The Fourth Ocean Putnam Corporation and the Town of Hempstead, Appellees, entered, pursuant to rule 56 of The Federal Rules of Civil Procedure, a motion for summary judgement in the appellees favor "dismissing the action on the ground that there is no genuine issue as to any material fact, there is no Federal question and that the defendants are entitled to a judgment as a matter of law," to be held June 2nd, 1976.

The motion for summary judgment dismissing the action was granted September 30, 1976.

STATEMENT OF THE ISSUES

1. We are appealing the motion which was denied before Judge Weinstein, September 28, 1976 - Eastern District Court. The motion was to amend the complaint so as to make the Honorable Carla Hills, Secretary of Housing and Urban Development a party to the action.

2. Article 6, Section 2 U.S. Constitution. "The constitutum and the laws of the United States which shall be made in pursuance thereof, all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." A state judge can rule on a Federal question. However, State Judge Suozzi failed to scrutinize the Flood Insurance Act as amended in the Article 78 proceeding. He merely scanned the regulations promulgated by a HUD administrator. We charge the Secretary of HUD has failed to carry out the intent and purpose of Congress set forth in the Flood Insurance Act, 1968 as amended. (F.I.A.) since the regulations fail to reflect said intent and purposes.

3. We are asking for a judicial interpretation of the Flood Insurance Act as amended. Only the Federal Courts can interpret the statutory laws of the United States and direct

a Federal agency to comply with Federal Statutes.

4. The Sec. of HUD failed to follow the directives of the congressional act to obtain or use information from the Dept. of Defense (U.S. Army Corps of Engineers), Dept. of Commerce (National Weather Service) for flood plain areas and especially high risk flood areas (where the subject property is located).

5. The Town officials failed in their constitutional responsibility to carry out the purposes of Congress as well as the purposes of New York State Zoning enabling statutes.

6. Slip Opinion, case No. 74-1047, April 20, 1976 - Supreme Court of the United States. Hills, Secretary of Housing and Urban Development v. Gautreaux et al. P. 21 - U.S. Supreme Court has "determined" a federal District Court "has authority" to "Direct HUD" to utilize its "powers" to comply with a Congressional Act - "to discharge HUD'S statutory duty to achieve "statutory objectives. We appeal for the District Court to use its broad powers to direct HUD to achieve the statutory objectives under the National Flood Insurance Act as amended.

STATEMENT OF THE CASE

I- Permission to construct a 170 unit all year round, three block long hotel, on the exposed oceanfront of the Atlantic Ocean, was granted by the Hempstead Board of Zoning Appeals dated February 6, 1975. The location of the hotel, on the exposed oceanfront, which has been identified by the

United States Army Corps of Engineers as in a high risk flood area due to the pounding action of the waves, is the crux of the case.

II- The Town of Hempstead became part of the Federal Flood Insurance Program August 10, 1971, Resolution No. 2092-1971, Case No. 16452.

III - Ruth Radow and Seymour Radow identified themselves at a State mandated public hearing dated November 27, 1974 before the members of the Board of Zoning Appeals, as United States citizens "in order to protect my Constitutional right for equal protection under the 14th Amendment to enjoy my home and be protected against any deprivation of that civil right through action taken under State Law." (Lynch v. Household Finance Corp. 405 U.S. 538 at 552 (1972).

IV - The District Court did not acknowledge that there was a controversy. It disregarded the position taken by the appellants at the hearings before the Hempstead Board of Zoning Appeals dated May 30, 1974 and Nov. 27, 1974. The District Court failed to recognize our contention that the Board members did not comply with the purposes of Zoning Sec. 263 New York Town Law which mandated that Towns shall . . . "secure safety from flood". Such action created a threat of injury and deprevation of our "fundamental" "personal" and constitutional right to life, liberty and enjoyment of our home under the 14th Amendment U.S. Constitution. Lynch v. Household Finance Corp. (Supra) Flood Insurance Act as amended 1968.

STATEMENT OF FACTS

We, the appellants, Ruth and Seymour Radow, are resident owners of a one family home in Atlantic Beach, Town of Hempstead, County of Nassau, New York State.

Atlantic Beach is a one family home community. It is part of the Long Beach Island. Atlantic Beach is two to three blocks wide and approximately one and a half miles long. This section of the barrier island is bordered by the Atlantic Ocean on the South and West and Reynolds Channel on the North. The ocean front is mainly developed with beach clubs. There are two summer hotels. Egress to the mainland is through a mechanical bridge in the west end of Atlantic Beach. Long Beach Island is approximately 10 miles long with two mechanical bridges. One at the middle and one at the eastern end of the island. (Long Beach in the middle and easterly at Point Lookout.)

We attended the public hearing May 30, 1974 and November 27, 1974 before the members of the Hempstead Board of Zoning Appeals in opposition to the construction of a 170 unit three block long hotel on the ocean front in a high hazard flood area which is threatened with destruction by the pounding action of the waves during hurricanes and other violent storms, described above.

We opposed granting approval of the plan for construction of the building on the grounds that evacuation would be more hazardous with the addition of future tenants of the hotel and all the residents of the Atlantic Beach community and would

exascerbate evacuation efforts in the event of ocean borne storm.

The land is zoned business. A hotel is not permitted by right in a business district. A special exception can only be granted by the members of the Board of Zoning Appeals.

We obtained National flood insurance for our home in 1974. We increased it to the maximum coverage.

We brought to the Board Members' attention and submitted a copy for inclusion in the public record the seventy page report, Tidal Flood Plain Information, a study made of the South Shore by the United States Army Corps of Engineers dated June 1971. It stated that a standard project tide resulting from a standard project hurricane would be 12.3 feet above mean sea level. This tide is "reasonably characteristic" of the area. This level without waves would flood our cellar. The Town of Hempstead requires that buildings be 9 feet above mean sea level. We called the Board Members' attention to this fact and to the statement that "Evacuation routes become inoperative during periods of extreme tide levels.". (Page 8). We submitted this report in evidence.

We emphasized the hazards to ourselves, our children and others similarly situated in case of evacuation because of ocean borne storms.

We were also concerned with loss of eligibility to renew our flood insurance because approval of the hotel in a high hazard flood plain would not be in compliance with the purpose and intent of the Flood Insurance Act, to "constrict" building in a high hazard area.

The Board Members disregarded our grounds for objection. The members of the Board of Zoning Appeals failed to take judicial notice of the fact that we claimed granting approval of the construction of the hotel would act to deprive us of our fundamental "personal" privileges, rights and liberties as homeowners guaranteed by the 14th Amendment of the U.S. Constitution.

We are in Court because we believe the U.S. Constitution, Federal and State Laws support the position we took. We believe this is not just a local problem but one which affects the lives and property of persons along the entire Eastern Seaboard.

Judge Weinstein stated in Eastern District Court, September 28, 1976:

"We can all take judicial notice that all along the East Coast you have this problem. . .It goes all the way down to Florida behind barrier beaches. They're all subject to flooding and they are subject to hurricane devastation. . . .and the more people you put into the area the more people you have to evacuate."

QUESTIONS

I - Is there a controversy between the Appellants and the Appellees?

II - Are the legal bases for motions to dismiss for lack of jurisdiction valid?

III - Has the Eastern District Court the authority to direct HUD to engage in remedial efforts?

ARGUMENT

I - Is there a controversy between the appellants and the appellees?

The controversy in this case is clear. The members of the Board of Zoning Appeals contend that only one section of New York State's Statute which enables towns to zone land applies to their activities. The members of the Board defend their actions by referring solely to Sec. 267, N.Y. Town Law which mandates persons to serve as members of the Board of Zoning Appeals. We contend that the members of the Board are not immune from the provisions of other sections of that State Statute which mandates that the Town Board appoint members to serve on the Board of Zoning Appeals.

On the other hand, we contend that the actions of the Members of the Board must also be in compliance with the purposes for which the New York State Legislature granted zoning power to

towns set forth in Sec. 261 and 263, e.g., to promote the health, safety and welfare and to secure safety from flood for those residing in the community. Board of Zoning Appeals hearing May 30, 1974, November 27, 1974 P. 2. Similarly the members of the Board reveal that they are only concerned with the fact that H.U.D. has approved the eligibility of the Town of Hempstead to participate in the Flood Insurance Program, that they are not concerned with the purposes and intent of Congress set forth in the National Flood Insurance Act of 1968 as amended (F.I.A.) The members of the Board have presented no evidence to show that they consulted with HUD before approving construction of a 170 room hotel in the high hazard flood plain in Atlantic Beach. They have presented no evidence to show that they called HUD's attention to the 70 page report prepared by the U.S. Army Corps of Engineers describing the particular high hazards from flooding and pounding action of waves to which the hotel site is subject.

We contend that the special exception and variances granted by the members of the Board could not have been anticipated by HUD when it approved the eligibility of the Town of Hempstead after presumably studying Hempstead's Zoning Ordinance and zoning maps. The Ordinance does not permit hotels by right on the Fourth Ocean Putnam land zoned BUSINESS. Only the members of the Board of Zoning Appeals have been empowered

to use their descretion in granting approval of such construction under the provisions of the Hempstead Zoning Ordinance.

It is our contention that approval by the members of the Board of plans for the construction of a hotel on the exposed high hazard ocean front site was arbitrary and unreasonable, in utter disregard of the Corps of Engineers detailed report of special flood hazards and in violation of the purposes for which the above cited State and Federal Laws were enacted. We contend that the actions taken by the members of the Board do not bear a rational relationship to legitimate state interests and are invalid and unconstitutional.

If the construction approved by the members of the Board is not prohibited by Court decree we shall be deprived of our "fundamental" "Personal", and constitutional right to life, liberty and enjoyment of our home, as guaranteed by the 14th Amendment, U.S. Constitution, Lynch (supra).

The members of the Board have not shown that a compelling State interest necessitates deprivation of "fundamental" constitutional rights of all similarly situated in the Atlantic Beach community.

We also contend that members of the Board are Town officials (N.Y. State local government officials, see N.Y. Statute of local governments, Laws 1964 Chapter 205, Article 1, Sec. 3, Article 2, Sec. 10) acting under color of State Statute, every one a "person" within the meaning of 42 U.S. C. 1983 and that the Eastern District Court, N.Y. has jurisdiction under

28 U.S. C 1343 (3) over our action for declaratory judgment and appropriate Equitable Relief, to prevent further deprivation under color of state law, statute, or ordinance, of rights, privileges and immunities secured to plaintiffs by the Constitution and Statutes of the United States, including the right to equal protection and due process of law under the 14th Amendment to the Constitution of the United States and under Title 42, United States Code, Section 1983. (See U.S. Supreme Court opinion in Lynch v. Household Finance Corp. 538, 541 f f regarding jurisdiction under 28 U.S. Code 1343 (3).)

II - Are the legal bases for motions to dismiss for lack of jurisdiction valid?

We contend that we do have standing under the substantive law 43 U.S.C. 1983 and its jurisdictional counterpart 28.U.S.C. 1343(3). "Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel is, in truth a "personal" right, whether the "property" in question be a welfare check, a home (emphasis added) or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." Lynch v. Household Finance Corp. (Supra) 552

This action under 42 U.S.C. 1983 and its jurisdictional counterpart 28 U.S.C. 1343 (3) See Lynch v. Household Finance Corp.

405 U.S. 538 at 552) contends that the members of the Board of Zoning Appeals have acted unconstitutionally.

The appointment of persons to serve as members is mandated by Section 267, New York Town Law.

If the decisions are implemented, they will deprive us of our "fundamental", "personal" rights to life and enjoyment of our home guaranteed by the 14th Amendment, U.S. Constitution. "The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth a "personal" right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." Lynch v. Household Finance Corp., 405 U.S. 538 at 552 (1972).

We contest the granting of the motions to dismiss for lack of jurisdiction by citing a Ninth Circuit Court opinion. The City of Petaluma challenged the power of the District Court to hear the suit in Construction Industry Associates of Sonoma County v. The City of Petaluma 375 F. Supp. 574, contending that the Court had no jurisdiction under 28 U.S.C. 1343 and 42 U.S.C. 1983 to entertain a suit against members of the City Council. The ninth Circuit Court of Appeals "held that a City official is a "person" within the meaning of Sec. 1983 and that a District Court has jurisdiction under 28 U.S.C. 1343 over an action to enjoin him from enforcing an unconstitutional

statute. Ybarra v. City of the Town of Los Altos Hills, 503 F 2d 250, 253 (9th Cir. 1974) "Construction Industry (Supra) 522 F 2d 897, 903.

Is jurisdiction under 28 U.S.C. 1331 required in this case?

Is jurisdiction in this case under 28 U.S.C. 1331 requiring that a minimum amount of \$10,000. in controversy be alleged and proved? The preceeding paragraph clearly establishes jurisdiction under Sec. 1343 (3) which applies only to alleged infringements of rights under color of State Law, whereas Sec. 1331 contains no such requirement. See detailed history of the origins of 42 U.S.C. 1983 and its jurisdictional counterpart 28 U.S.C. 1343 (3) in Lynch (Supra) pp. 542 -552 and Mr. Justice Whites agreement regarding Federal jurisdiction under 28 U.S.C. 1343 at p. 556.

The Members of the Board of Zoning Appeals have not shown that their decisions granting variances and a special exception were necessary because of a compelling State interest.

This compelling state interest must be shown when those acting under the color of State Law deprive citizens of constitutionally guaranteed fundamental rights and privileges where acknowledged fundamental rights guaranteed by the U.S. Constitution are burdened by the State action being challenged in Federal Court. The Court applies strict equal protection scrutiny. There must be "a clear showing that the burden imposed

is necessary to protect a compelling and substantial government interest. Shapiro v. Thompson 394 U.S. 618 at 634.

On the contrary, the members of the Board 1) disregarded the intent and purposes of the F.I.A. and 2) disregarded the statutory purposes of zoning set forth in Sec. 261, 262, 263 New York Town Law. The Board members have been granted only limited powers by the New York State Legislature in Sec. 267.

The decisions of the members of the Board of Zoning Appeals in this case do not bear "a rational relationship to legitimate State interests."

A declaratory judgement, and appropriate relief from the Board's members' unconstitutional actions, are sought because the decisions rendered by the Board members acting in their quasi-judicial capacity under color of State statute, do not bear "any rational relationship to a legitimate state interest" specifically set forth in section 263 N.Y. Town Law - "to secure safety from flood" and to "conserve the value of buildings".

It is worth while to note that the New York State Legislature added the word flood in Laws of 1956 Chapter 295 effective April 4, 1956 (see footnote under Sec. 263, N.Y. Town Law McKinney's Consol L. c 62, Art. 16). Thus the State amended Sec. 263 N.Y. Town Law which had been copied from Sec. 3 of The Standard State Enabling Act revised 1926 and promulgated by the U.S. Department of Commerce.

The State Law is intended to protect us against loss of life, limb, property from flood. We have been deprived of this protection by the members of the Board of Zoning Appeals acting under color of State Law. The more people that are put into a hazardous area will increase the danger in evacuating a flood area upon advise of the National Weather Service and responsible County officials.

Therefore, the Board members actions are "invalid;" they do not further a legitimate state interest . Construction Ind. Assn. Sonoma County v. City of Petaluma, 552 F 2d 897, 906.

Our "Fundamental", "personal" rights to life and enjoyment of our home are protected by the 14th Amendment against deprivation of State action or action of officials under color of State Law.

If the decisions are implemented and the building approved by the members of the Board, such action will deprive us of our "fundamental" "personal" constitutional rights to life and enjoyment of our home guaranteed by the 14th Amendment, U.S. Constitution. Lynch v. Household Finance (Supra.)

"It cannot be doubted that among the rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of the Amendment as an essential

precondition of other basic civil rights and liberties which the Amendment was intended to guarantee. " Shelley v. Kraemer, 334 U.S. 1, 10 (1948)

Such personal enjoyment is directly dependent upon assurances that our eligibility to renew our National Flood Insurance policy will not be jeopardized. The possibility of loss of our eligibility to insure our home and possessions against risk of floods constitutes a "threatened injury" of great magnitude to us. S v. D, 410 U.S. 614, 617 (1973).

CHAPTER X - FEDERAL INSURANCE ADMINISTRATION, subchapter B, National Flood Insurance Program.

Section 1909.24 Suspension of Community Eligibility.

(a) A community eligible for the sale of flood insurance which fails to provide official notice to the Administration by Dec. 31, 1971 that it has adopted land use and control measures for its flood-prone and mudslide-prone areas in accordance with the requirements of Sub-part A of Part 1910 of this subchapter shall automatically lose its eligibility at midnight on that date. A community which provides such official notice but fails to submit the required land use and control measures to the Administration by January 15, 1972, for review shall automatically lose its eligibility at midnight on that date. The community's eligibility shall remain terminated until the land use and control measures have been received by the Administration.

The members of the Board of Zoning Appeals have failed to comply with State and Congressional objectives set forth in New York Zoning Enabling Statutes and the F.I.A. as amended. (42 U.S.C. 4001 et seq.)

Approval of construction of a multi-room residential structure in a known high-hazard flood zone constitutes a flagrant flouting of state and federal laws. Thus there would be an increase in the hazards of evacuation for ourselves and our children as well as an increase in the risks of loss from floods due to suspension of eligibility to renew our flood insurance policy, particularly after a new Federal Administration takes office in January 1977. It is reasonable to anticipate that full compliance with the intent and purposes of Congress as set forth in F.I.A. as amended, will restrict construction of high density residential structures on exposed oceanfront property where the hazards and destruction caused by the pounding action of waves are well-known to officials of the U.S. Army Corps of Engineers and the National Weather Service (N.O.A.A.) Congress has directed that both of these agencies assist the Secretary of HUD in the identification and mapping of flood-risk zones (Section 204, 42 U.S.C. 4101). Thus the Secretary of HUD, appears to have ignored the detailed report prepared by the Army Corps of Engineers identifying the high hazard area in Atlantic Beach, and also appears to have ignored advices regarding the vulnerability to ocean storms. The same warning for the Atlantic Beach area was given by the Chief meteorologist of the National Weather Service, New York office in 1976. Testimony of officials of the above-

named agencies would enable the District Judge to determine whether there has been compliance with the purposes and intent of the Federal and State laws cited above.

"WAVE ACTION is responsible for the erosion of the beaches and for most of the structural damage along exposed waterfront of the Long Beach and Jones Beach barrier islands. Wave heights are dependent upon the velocity, direction, and duration of the wind and length, width, and depth of the water area over which the wind is acting. Wave runup to elevations higher than the solid-water level is a significant factor to exposed locations adjacent to areas of fairly deep water.

"Waves of up to 30 feet have been reported off the south shore of Long Island. Page 8, Standard Project Tide P. 6, 60.

"TIDAL FLOOD PLAIN INFORMATION, South Shore of Nassau County, Long Island.

Congress defined the term "flood" so as to include innundation from tidal surges and hurricanes (42 U.S.C. 4121) Sec. 1370 (a) (1). Mr. Williams fails to acknowledge the height of the tidal surge during a "standard project hurricane" of 12.3 above mean sea level. This elevation of the water would innundate all of the barrier island where Atlantic Beach is located.

William Williams, Deputy, Deputy Commissioner, Department of Buildings stated that the Town has adopted "adequate land use and control measures consistent with Federal Criteria". Not a

single change in the zoning regulations is described in that affidavit because HUD apparently demanded none. Now a new Federal Administrator takes over. We can expect enforcement of Congress" intent.

William Williams also states that "Federal legislation under Section 42 of the United States Code does not prohibit construction in flood plain areas."

We contend that the Town position as presented by William Williams reveals the fact that there has been complete disregard of the scientific findings of the U.S. Army Corps of Engineers with regard to the special hazards to lives and buildings along the exposed ocean front in Atlantic Beach. The following quotations from the Corps of Engineers 70 page report, June 1971 highlight these hazards. Specifically, Town officials have disregarded on Page 8:

"Hazardous conditions occur as a result of the rising flood tides, the high wind velocities, and the pounding action of waves. The operation of emergency equipment is seriously hampered by the flood waters. Evacuation routes become inoperative during periods of extreme tide levels... .

Flood damages that would result from recurrence of major known floods would be substantial. Extensive damages, far greater than those which would result from a recurrence of Hurricane Donna (Intermediate Regional Tidal Flood), would result from the occurrence of a Standard Project Tidal Flood because of the wider extent of the flooding and the greater depth involved. Damage from wind and wave action would be appreciable. Page 66 p. 11 Flooded Areas, p. 48.

The Fourth Ocean Putnam Corp.'s property is specifically in a coastal high hazard area. The Flood Insurance Administration differentiates between flood plain areas and "coastal high hazard areas".

"Coastal high hazard areas" means the position of a coastal flood plain having special flood hazards that is subject to high velocity waters, including hurricane wave wash and tsunamis- Chapter X, Federal Insurance Administration, Subchapter B - National Flood Insurance Program 1909.1 Subpart A-General.

Has the Eastern District Court the Authority to direct HUD to engage in remedial efforts?

The "contraversy can only be resolved by the Eastern District Court after hearing testimony from officials of Federal, State, County and Town whose legal duty and obligations directly involve them (in their official capacities) with proper implementation of the Flood Insurance Act, as amended.

Thus we are appealing the motion which was denied before Judge Weinstein, September 28, 1976. The motion was to amend the complaint so as to make the Secretary of Housing and Urban Development a party to the action.

The legislation implementing the federal Flood Insurance Program recognizes and depends upon proper utilization of the powers delegated to the Hempstead Town Board and the Board of Zoning Appeals by New York State's zoning enabling statutes.⁽¹⁾ The fundamental purpose of the State's police power when it is delegated to Towns for land use regulation (i.e., zoning) is to

(1) 42 U.S.C. 4012, 4022
N.Y. Town Law Sec. 261,
262, 263

promote the general welfare of citizens. In delegating the power to zone land, New York's legislators enumerated certain specific objectives - "Purposes in View". The statute provides that zoning regulations shall be designed to secure safety from flood, and shall be made with reasonable consideration to conserving the value of buildings. (Section 263, Town Law).
42 U.S.C. 4022.

Sec. 1315. After December 31, 1971 no new flood insurance coverage shall be provided under this title in any area (or subdivision thereof) unless an appropriate public body shall have adopted adequate land use and control measures (with effective enforcement provisions) which the Secretary finds are consistent with the comprehensive criteria for land management and use under section 1361.

42 U.S.C. 4012 (c) - The Secretary shall make flood insurance available in only those states or areas (or subdivisions thereof) which he has determined have

(1) evidenced a positive interest in securing flood insurance coverage under the Flood Insurance Program, and

(2) given satisfactory assurance that by December 31, 1971 adequate land use and control measures will have been adopted for the State or areas (or subdivision) which are consistent with the comprehensive criteria for land management and use developed under section 1361 and that the application and enforcement of such measures will commence as soon as technical information on floodings and on controlling flood elevations is available.

New York State Supreme Court Justice Suozzi of the Supreme Court of the State of New York failed to scrutinize the Flood Insurance Act as amended in an Article 78 proceeding, Special Term, Part I, Nassau County dated November 20, 1975. He merely scanned the regulations adopted by the Federal Administrator.

We charge the Secretary of HUD has failed to carry out the intent and purposes of Congress set forth in the F.I.A. since enforcement of the regulations failed to reflect said intent and purposes.

42 U.S.C. 4001 sets forth the declared purpose of Congress (c) (1) "a program of flood insurance can promote the public interest by providing appropriate protection against the perils of flood losses and encouraging sound land use and by minimizing exposure of property to flood losses . . .

(e) "It is the further purpose of this title to (1) encourage State and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses, (2) guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards. . .

(5) Authorize continuing studies of flood hazards in order to provide for a constant reappraisal of the Flood Insurance Program and its effect on land use requirements."

We are asking for a judicial interpretation of the Flood Insurance Act as amended. Only the Federal Courts have the power to interpret the statutory laws of the United States and direct a Federal agency to comply with Federal statutes.

Marbury v. Madison 1 Cranch 137, 163.

The U.S. Supreme Court has "determined" a Federal District Court "has authority" to "Direct HUD" to utilize its "powers" to comply with a Congressional Act "to discharge HUD's statutory duty to achieve "statutory objectives."

SLIP OPINION

Supreme Court of the United States - Hills, Secretary of Housing and Urban Development v. Gautreaux 74-10 47 April 20, 1976 P. 21.

P. 4 The U.S. Supreme Court held Federal Courts cannot "restructure operation of local and state government entities.

In our case proper use of the State's power to protect citizens is the constitutional basis upon which local zoning restrictions have been upheld. Euclid v. Ambler 272 U.S. 365 (1926) Belle Terre v. Boraas 416 U.S. 1 (1974) Pataluma (Supra).

The Town of Hempstead Zoning Ordinance and zoning map have not identified high hazard flood areas along the oceanfront, for areas under its zoning jurisdiction on Long Beach Island. The Federal Flood Insurance Act recognizes and depends upon proper utilization of state and local laws restricting use of land "to promote health, safety and welfare of citizens."

P. 17 The Civil Rights Act expressly directed the Secretary of HUD. . .

The National Flood Insurance Act expressly directed the Secretary of HUD to designate "high hazard areas." The F.I.A. requires satisfactory assurance from local or state governments that they acted to comply with Congressional Objectives, before granting eligibility.

P. 21 The U.S. Supreme Court's "determination" that Federal District Court "has authority to direct HUD" "to engage in remedial efforts."

RES JUDICATA

State courts do not have the judicial power or "duty" to grant appropriate relief in our controversy. The State Judge Supzzi based his decision upon an administrative construction and interpretation of the federal statute (F.I.A.) not upon a judicial interpretation which has ascertained the true sense and meaning of Congress. It is essential that there be a judicial interpretation of the intent and purposes of Congress set forth in the F.I.A. reflecting the changed policy of Congress with respect to the protection of lives and property in flood prone areas.

The article 78 suit was initiated by another resident of Atlantic Beach. The appellants in this case were not parties to that suit. Stone v. City of Maitland 446 F2d 83 P. 86 1971 Florida Circuit Court. Judge John R. Brown, Chief Judge of The U.S. Court of Appeals 5th District, Florida.

"Under the doctrine of res judicata a prior judgment on the merits rendered by a State Court of competent jurisdiction operates as a bar to a subsequent adjudication of the same course of action, in substance rather than form, between the same parties or their privies in Federal Court." Emphasis in the original.

CONCLUSION

We respectfully request that this case be remanded to the District Court for a full hearing (with testimony by knowledgeable federal, state and county officials) who can inform the Court regarding the hazards of flood along Atlantic Beach's exposed oceanfront.

This is not just a local problem. The Court stated "we can all take judicial notice that all along the east coast you have this problem. . . It goes all the way down to Florida behind barrier beaches. They're all subject to flooding. And they are subject to hurricane devastation . . . And the more people you put into the area, the more people you have to evacuate." Minutes, Sept. 28, 1976, Eastern District Court.

Respectfully submitted,

RUTH RADOW and SEYMOUR RADOW
50 Tioga Avenue
Atlantic Beach, New York